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Court of Appeals
Division III
State of Washington

No. 343341

WASHINGTON STATE COURT OF APPEALS
DIVISION III

STATE OF WASHINGTON,

Respondent,

vs.

EDUARDO CHAVEZ,

Appellant.

OPENING BRIEF OF APPELLANT

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I. ASSIGNMENT OF ERROR

The trial court abused its discretion when it denied the defense an opportunity to introduce evidence of the accuser's reputation in her community for untruthfulness pursuant to ER 608(a).

II. ISSUE

Is the accuser's middle school a "community" under ER 608(a) in this case?

III. STATEMENT OF THE CASE

The State charged Eduardo Chavez with the second degree rape of Alicia Sims. [CP 1] The State's theory at trial was that Mr. Chavez raped Ms. Sims while she was passed out or asleep. [RP 525] Mr. Chavez claims Ms. Sims consented to the intercourse and that no crime was committed. [RP 534] At trial, the State supported its theory of the case, in part, by introducing the testimony of Sheridan Breeding, a friend of Ms. Sims who was not present during the alleged crime, but saw Ms. Sims the next day. [RP 290-96]

On cross-examination of Ms. Breeding, the defense was prepared to elicit testimony that Ms. Sims had a reputation as a liar both at her school and at the local skate park where she liked to spend time. [RP 298-319] During the offer of proof to the court, outside the presence of the jury, Ms. Breeding testified that she had known and attended school with

Ms. Sims for approximately six years [RP 298]; that she had been acquainted with hundreds of people who knew both Ms. Sims and Ms. Breeding [RP 300]; that Ms. Sims' current reputation in that community was not "very good with the truth" [RP 301]; that Ms. Sims was known to lie to teachers and had been kicked out of classes [RP 304-05]; that Ms. Sims had told Ms. Breeding that she knew her reputation at school is that she is a liar [RP 306]; and that Ms. Sims' reputation for untruthfulness was known by Ms. Breeding both before the alleged rape and at the time of trial [RP 309-12].

The State objected to the testimony and, after inquiring during the offer of proof, argued that "reputation among other junior high school kids that someone may or may not be truthful is not germane to our inquiry today" and that Ms. Breeding's testimony was based on "rumors . . . that may be baseless and groundless." [RP 314, 307] The trial court ruled from the bench, immediately after the offer of proof was made, stating:

The Court finds that the relevant factors of the frequency of contact between members of the community, the amount of time known in the community and the role the person played in the community and the number of people, that that foundation has not been met and that that opinion statement with reference to truthfulness and veracity will not come in.

[RP 316]

Ms. Breeding never testified as to her personal knowledge of Ms. Sims' reputation in her community for untruthfulness, and the jury returned a guilty verdict. [CP 31]

IV. SUMMARY OF ARGUMENT

In this case, where the only issue at trial is whether the sexual intercourse between the accuser and the defendant was consensual, evidence relating to the credibility of the principal parties involved is critical. That evidence should have been admitted and evaluated by the jury. But it was not, and the trial court abused its discretion in failing to admit that evidence. That abuse substantially prejudiced the defendant's rights. A new trial is necessary to correct the trial court's error.

V. ARGUMENT

The trial court abused its discretion when it excluded admissible character evidence related to the accuser's poor reputation for veracity in the community.

Under ER 608(a), the credibility of any witness "may be attacked or supported by evidence in the form of reputation, but subject to the limitations: (1) the evidence may refer only to character for truthfulness or untruthfulness, and (2) evidence of truthful character is admissible only after the character of the witness for truthfulness has been attacked by reputation evidence or otherwise." The rule parallels the Federal Rule, and

Washington courts have routinely looked to federal law when interpreting the Rule. See 5A Karl B. Tegland, Wash. Prac., *Evidence* §608.1, p. 419 (5th ed. 2007). The purpose of the rule is “to facilitate testimony from those who know a witness’s reputation for truthfulness so that the trier of fact can properly evaluate witness credibility.” State v. Land, 121 Wn.2d 494, 499, 851 P.2d 678 (1993). A witness’s reputation may be derived from any community or society in which the witness has a well-known or established reputation. State v. McEachern, 283 N.C. 57, 67, 194 S.E.2d 787 (1973).

To impeach a prior witness’s reputation for veracity under ER 608(a), a party must lay a foundation for the impeaching witness’s personal knowledge of that prior witness’s reputation for truthfulness in the community. Tegland at §608.4, p. 427. “To establish a valid community, the party seeking to admit the reputation evidence must show that the community is both neutral and general.” Land, 121 Wn.2d at 500. Courts have considered a number of factors in defining a witness’s community, including “the frequency of contact between members of the community, the amount of time a person is known in the community, the role a person plays in the community, and the number of people in the community.” Id.

These factors are non-exclusive and present only a suggested framework for determining a community. In the end, a community, for the purposes of ER 608(a), is any “substantial group of people among whom [the witness] is well known” and can include workplaces (State v. Callahan, 87 Wn. App. 925, 935-36, 87 Wn. App. 925 (1997)), business communities (Land, 121 Wn.2d at 500-01), jails, schools, and even Boy Scout troops (State v. Carol M.D., 89 Wn. App. 77, 94-95, 948 P.2d 837 (1997)). See 1 Charles T. McCormick, *Evidence* §43 (7th ed., June 2016 Update).

The decision to admit reputation evidence under ER 608(a) is left to the discretion of the trial court. Id. A trial court abuses that discretion when “it acts in a manner that is manifestly unreasonable or based on untenable grounds or reasons.” Id.

a. The decision to exclude ER 608(a) testimony is manifestly unreasonable.

Generally, any evidence tending to make a fact of consequence more or less likely that is not substantially outweighed by its prejudicial effect should be admitted. ER 401, 402. Ms. Breeding’s testimony was clearly admissible, and the failure to admit it was error because Weston Middle School is Ms. Sims’ community under any common sense definition of the word.

In Callahan, a trial court abused its discretion by excluding reputation testimony regarding the defendant's reputation for peacefulness in his work community. Callahan, 87 Wn. App. at 935. Division Two specifically found that the night shift at Weyerhaeuser was a community under ER 608(a). Id. at 936.

Similarly, in Land, our Supreme Court affirmed the admission of reputation evidence regarding the defendant's reputation for veracity in a very small, but close-knit, "wood shook industry." Land, 121 Wn.2d at 500. That Court specifically found that Land's "numerous personal contacts with various members of the industry," even though they were few, were sufficient to form a community. Id.

Finally, in Carol M.D., this Court held the trial court abused its discretion by excluding reputation testimony about an alleged victim's reputation for truthfulness from a member of his Boy Scouts troop. Carol M.D., 89 Wn. App. at 95. While that decision is silent with respect to the size of the troop or the amount of time the alleged victim spent with the troop's members, surely it is smaller and less frequent than junior high school.

These cases demonstrate that "community" is a fluid concept. Some communities are large and some are small; some people can form reputations without playing a major role within that community while

others remain anonymous. The important thing is to be sure that the reputation discussed at trial is an earned one with its basis outside of the personal opinion of the impeaching witness and rooted in the opinion of those that know the impeached witness best. Land, 121 Wn.2d at 498-99.

Ms. Breeding testified that she had known Ms. Sims for many years, that they remained friends and attended the same schools since the second grade, that Ms. Sims was known within her school community, that the community of students at Weston was small by comparison but fed by a number of outlying rural schools and, therefore, neutral and general, and that Ms. Sims' reputation for veracity within that community was poor. It is understood that students at public schools spend approximately 40 hours per week attending school, and that does not account for time before and after school with the same students.

This trial was **only** about credibility. Two people tell two different stories. One story is a crime, the other is not. This jury's sole job was to examine and determine the credibility of those two people and the other witnesses testifying in their support.

Ms. Breeding testified that Weston Middle School was a community and that Ms. Sims had a reputation in that community for lying. That testimony was admissible evidence bearing directly on the sole issue at trial. And it was kept from the jury without explanation or

justification by the court. That decision was manifestly unreasonable and an abuse of discretion.

b. The decision to exclude ER 608(a) testimony is untenable and is bad policy.

When excluding Ms. Breeding's testimony, the trial court simply recited the non-exclusive factors mentioned in Land. The trial court did not say what was lacking from Ms. Breeding's testimony. Mr. Chavez submits that is because the trial court had no basis to exclude it. Simply put, if a person's regularly attended middle school is not a community, for the purposes of ER 608(a), then no such community can ever exist. When in one's life would she have more regular, continuous contact with a large group of neutral and general people than the years spent in school? The ruling defies logic.

The State argued that the reputation evidence solicited through Ms. Breeding was mere "junior high school rumors," suggesting it was not, in fact, Ms. Sims' general reputation, but just how a few middle school students felt about her. [RP 307, 314] But that is a decision for the jury, not the judge. A jury is entirely capable of hearing reputation evidence and weighing its credibility, just like the jury weighs all other evidence at trial. The question before the judge was whether Weston is Ms. Sims' community. And it clearly is.

Ms. Sims' veracity is a central, critical aspect of Mr. Chavez's defense. In any case where the two principal parties tell wildly diverging stories, evidence that one of them has a reputation for lying is important testimony that the jury should hear and consider. There was no risk of prejudice by allowing Ms. Breeding to testify that she knows Ms. Sims has a reputation at school for being a liar. The State would have every opportunity to attack that testimony and argue its theory of that testimony's credibility to the jury. But there is substantial and irreparable harm to the defendant's case by excluding it. The case should be retried and the testimony allowed.

VI. CONCLUSION

For the foregoing reasons, Mr. Chavez respectfully requests this Court reverse the decision of the trial court below and order a new trial.

DATED this 3rd day of October, 2016.

s/ David P. Gardner

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DECLARATION OF SERVICE

The undersigned declares under penalty of perjury under the laws of the State of Washington as follows: That on October 3, 2016, I served the foregoing document on all counsel and on appellant by causing a true and correct copy of said document to be delivered to them at the addresses shown below in the manners indicated:

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DATED at Spokane, Washington, on October 3, 2016.

Cheryl Hansen